BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DENNIS L. HANDKE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,019,159
ILC OF TOPEKA, INC.	)	
Respondent	)	
AND	)	
	)	
CINCINNATI INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the November 12, 2004 preliminary hearing Order of Administrative Law Judge Brad E. Avery. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that claimant, as a member of a limited liability company (LLC), was excluded from benefits under the Kansas Workers Compensation Act pursuant to K.S.A. 2004 Supp. 44-508(b) and K.S.A. 2004 Supp. 44-542a, as no election to be covered under the Workers Compensation Act had been filed as required by statute. The Appeals Board (Board) heard oral argument on April 12, 2005.

APPEARANCES

Claimant appeared by his attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Christopher J. McCurdy of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record as follows: the preliminary hearing transcript of November 9, 2004, with exhibits attached, and the November 3, 2004 deposition of Edmond Carmona, with exhibits attached. In addition, the Board has considered the documents of record filed with the Division of Workers Compensation in this matter.

ISSUES

1. Was claimant excluded under the Kansas Workers Compensation Act from coverage pursuant to K.S.A. 2004 Supp. 44-508(b), K.S.A. 2004 Supp. 44-505 and K.S.A. 2004 Supp. 44-542a?

2. Does the issuance of a workers' compensation insurance policy, excluding by name a "member" of an LLC, estop respondent from contending an unnamed owner of the LLC was also excluded for workers' compensation insurance coverage purposes?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Board finds the Order of the ALJ should be reversed and the matter remanded to the ALJ for the determination of additional issues.

Claimant, a surveyor, began working for respondent as an employee on January 2, 1999. Claimant's title at that time was chief land surveyor, which required claimant to go out into the fields to do boundary surveys, locate markers and establish boundary markers for property owners. Claimant has been a licensed surveyor for 23 years.

At the time of claimant's hire, it would have been respondent's responsibility under the Kansas Workers Compensation Act to provide workers' compensation coverage for claimant. However, there is no information in this record as to whether respondent actually provided workers' compensation coverage at that time.

Claimant worked for respondent in that capacity for approximately one year. At that time, Rick Dayton, a 50-percent owner in respondent's corporation, decided to sell his interest in the company. Mr. Dayton approached claimant to inquire if he was interested in buying part of the company. Ultimately, claimant made the decision to buy half of Mr. Dayton's share, which would result in claimant owning 25 percent of the company. The other half of Mr. Dayton's share was purchased by the other owner, Edmond Carmona. This resulted in Mr. Carmona owning 75 percent of the company, with claimant owning 25 percent.

At the time claimant was hired, he was paid an annual salary of $50,000. After purchase of the interest in the LLC, claimant's compensation package did not change. Claimant continued working for respondent in his new capacity, supervising all field personnel. Before the purchase, claimant was in charge of a crew. After the purchase, claimant took over the supervisory responsibilities for not only his crew, but also Mr. Dayton's crew. Claimant also assumed responsibility over all mortgage title inspections.

Claimant's job duties were more in line with field surveying and the technical aspects of the company's operations, while Mr. Carmona took care of the financial aspects of running the company. After becoming a part-owner, claimant was provided a $300,000 life insurance policy on the life of Mr. Carmona, and Mr. Carmona had a $100,000 policy on claimant. Those key man insurance policies were provided by the company.

Claimant's purchase of an ownership interest in respondent company occurred on December 31, 1999. Documents, marked as an exhibit to the Carmona deposition,[1] show in specific detail the amounts of monies involved, with the percentage of ownership interest being purchased. The document, which is signed by claimant, Mr. Dayton and Mr. Carmona, shows claimant as an owner and member in the LLC.

In a document titled Waiver And Notice Of Consent To Action By Members,[2] both claimant and Mr. Carmona agreed that with claimant becoming a member of the LLC, Mr. Carmona would remain the single manager of the company.

At the time claimant purchased an interest in the LLC, K.S.A. 44-542a (Furse 1993) stated,

> Each individual employer, partner or self-employed person may elect to bring himself or herself within the provisions of the workmen's compensation act, by securing and keeping insured such liability in accordance with clause (1) of subsection (b) of K.S.A. 44-532. Such insurance coverage shall clearly indicate the intention of the parties to provide coverage for such employer, partner or self-employed person. When such election is made, the insurance carrier or its agent shall caused to be filed with the director a written statement of election to accept thereunder so that such employer, partner or self-employed person is treated as an employee for the purposes of the workmen's compensation act pursuant to such election. This election shall be effective until such time as such employer, partner or self-employed person ceases to be insured in accordance with clause (1) of subsection (b) of K.S.A. 44-532, whereupon a written statement withdrawing such election shall be filed with the director.

As of the time of claimant's purchase of membership in the LLC, LLC members were not required to file an election with the Director of Workers Compensation indicating

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[1] Carmona Depo., Ex. 5.

[2] Carmona Depo., Ex. 2.

a desire to be covered by workers' compensation insurance. However, effective July 1, 2002, K.S.A. 44-542a was amended as follows,

> Each individual employer, partner, limited liability company member or self-employed person may elect to bring such employers within the provisions of the workers compensation act . . . .[3]

Beginning July 1, 2002, claimant, as a member of an LLC, was required to elect coverage under the Act, clearly a substantial change in claimant's workers' compensation status.

Claimant was somewhat familiar with the election requirements under the Workers Compensation Act. Prior to hiring on with respondent, claimant had been self-employed in his own company. While self-employed, claimant had elected to provide workers' compensation insurance for himself, satisfying the requirements of K.S.A. 44-542a (Furse 1993). This indicated a desire on claimant's part to be covered by workers' compensation insurance, even while self-employed.

Respondent provided workers' compensation insurance for its employees through Cincinnati Indemnity Company. The policies placed into the record cover the period August 11, 2003, through August 11, 2004, and August 11, 2004, through August 11, 2005.

On August 3, 2004, claimant was involved in a motor vehicle accident while a passenger in a vehicle driven by another company employee. Claimant sustained serious injuries while returning from a landowner location near Lake Wabaunsee, where claimant had gone to establish the boundary corners of the landowner's property. Claimant's injuries were substantial, with medical expenses exceeding $150,000. Claimant filed a workers' compensation claim, alleging that he was covered under respondent's workers' compensation contract with Cincinnati Indemnity Company. The ALJ determined that claimant, as a member of the LLC, had failed to file an election as required by K.S.A. 2004 Supp. 44-542a and was, therefore, denied coverage under the Act.

Respondent's workers' compensation policy, marked as an exhibit to the Carmona deposition,[4] covers the period August 11, 2003, through August 11, 2004, and would, therefore, encompass the date of claimant's accident. The insurance policy lists premiums based upon total estimated annual remuneration for "architects or engineer-consulting" of $114,264. Annual remuneration for "clerical office employees" was $54,507.

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[3] K.S.A. 2002 Supp. 44-542a.

[4] Carmona Depo., Ex. 9.

Respondent argues that these salaries did not include claimant's salary and, therefore, claimant was intended to be excluded from coverage under this contract. Respondent argues that Mr. Carmona identified claimant as one of the individuals involved in the compilation of these salary figures, which were then presented to the insurance company. Mr. Carmona testified regarding the creation of these salary numbers in his November 3, 2004 deposition. Mr. Carmona testified that when he was first contacted and asked to provide a listing of employees' wages to the insurance company for use in determining premiums for workers' compensation insurance, the information generated would have been information put together between him and Colleen Musil, the office manager.[5] Respondent argues that at his deposition, Mr. Carmona identified claimant as being one of the individuals involved in the creation of these figures.[6] Mr. Carmona, when asked again about the compilation of the figures, stated "[i]t would be a combination of both of us and Colleen would have talked to these people at the insurance company."[7] The Board construes this testimony to be referring to Mr. Carmona and Colleen as "both of us", not as Mr. Carmona, Colleen and claimant.

On January 15, 2002, the LLC's status with the state of Kansas was forfeited for failure to file its annual report and pay its annual fees. On August 13, 2004, a reinstatement certificate was filed with the Secretary of State, with all the appropriate taxes being paid and appropriate documentation filed with the Secretary of State's office. K.S.A. 2004 Supp. 17-76,139 requires limited liability companies organized under the laws of the state of Kansas to make annual reports in writing to the Secretary of State and pay the required franchise fees. Failure to do so will cause the articles of organization of a domestic limited liability company to be forfeited. However, the statute goes on to allow for reinstatement so long as the appropriate documentation, fees and penalties are filed with the Secretary of State's office.

> (e) When reinstatement is effective, it relates back to and takes effect as of the effective date of the forfeiture and the company may resume its business as if the forfeiture had never occurred.[8]

As noted above, respondent filed its documentation affecting reinstatement as of August 13, 2004.

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[5] Carmona Depo. at 38.

[6] Carmona Depo. at 43.

[7] Carmona Depo. at 43.

[8] K.S.A. 2004 Supp. 17-76,139.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[9] There is no dispute that claimant's accidental injury occurred out of and in the course of his employment in this instance. The question arises as to whether workers' compensation coverage was provided to claimant and whether claimant filed the appropriate election under K.S.A. 2004 Supp. 44-542a, as a member of an LLC. Contrary to claimant's argument, the forfeiture of the LLC status with the Secretary of State's office has no effect in this matter. The LLC appropriately filed all documentation, paid its fees and penalties allowing it to be reinstated. By law, the LLC continues to do business as though the forfeiture had never occurred.

A significant question arises, however, with regard to the insurance policy covering respondent's employees. Attached to the insurance policy covering respondent[10] is a document entitled Partners, Officers and Others Exclusion Endorsement. This document lists any person described in the schedule who is not covered by respondent's workers' compensation policy. The only person listed in that document is Edmond Carmona. Claimant's name is noticeably absent. K.S.A. 2004 Supp. 44-542a requires insurance coverage to "clearly indicate the intention of the parties to provide coverage for such employer, partner, limited liability company member or self-employed person."

K.S.A. 2004 Supp. 44-508(b), in defining the terms "workman," "employee" or "worker," states in part,

> Unless there is a valid election in effect which has been filed as provided in K.S.A. 44-542a and amendments thereto, such terms shall not include individual employers, limited liability company members, partners or self-employed persons.

It is claimant's obligation as a member of an LLC to obtain workers' compensation insurance, with the appropriate election to be made with the Director of Workers Compensation. Claimant argues that insurance coverage was provided through respondent's contact with Cincinnati Indemnity Company. Respondent argues that no appropriate election was filed as required by statute. The controversy to a significant degree centers around the exclusion endorsement attached to the contract between respondent and Cincinnati Indemnity Company. In this instance, the only excluded individual is the majority owner, Edmond Carmona. Claimant is not shown as being excluded from coverage.

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[9] K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

[10] Carmona Depo., Ex. 9.

Insurance is a matter of contract. The parties to a contract of insurance may choose whatever terms they wish, and the courts will enforce the policy as written, so long as the terms do not conflict with pertinent statutes or with public policy.[11]

If a dispute arises as to the meaning of the phrase "chosen by the parties," then the courts will attempt to determine what the parties intended. In order to do this, the courts will consider the policy as a whole and will examine the language used by the parties, taking into account the situation of the parties, the nature of the subject matter and the purpose to be accomplished.[12]

If there is uncertainty about the meaning of the policy, the courts will determine the meaning by applying the rules of construction. These rules do not apply unless the courts first determine that the policy is ambiguous. A policy is not ambiguous unless, viewing it as a whole, there is genuine uncertainty as to which one of two or more possible meanings is the proper meaning.[13]

In this instance, the controversy arises with regard to the exclusion endorsement and whether that exclusion endorsement includes claimant as an excluded individual under this workers' compensation policy. When ambiguity exists in a contract, one of two rules will be followed. The first is the doctrine of "reasonable expectations." The second is the rule of liberal construction.[14]

The courts recognize that insurance contracts are typically adhesion contracts in which the terms are drafted by the insurer and not negotiated between the parties. Courts have required insurers to state their intended meaning clearly and distinctly. If the meaning is not stated clearly, and a reasonable person in the insured position would have understood the words of the policy to mean something other than what the insurer intended, that understanding will control.[15] The second rule of liberal construction is that

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[11] *Western Casualty & Surety Co. v. Trinity Universal Ins. Co.*, 13 Kan. App. 2d 133, ¶ 1, 764 P.2d 1256 (1988), aff'd 254 Kan. 44, 775 P.2d 176 (1989).

[12] *American Media, Inc. v. Home Indemnity Co.*, 232 Kan. 737, ¶ 1, 658 P.2d 1015 (1983).

[13] *Patrons Mut. Ins. Ass'n v. Harmon*, 240 Kan. 707, 732 P.2d 741 (1987).

[14] *Penalosa Co-op Exchange v. Farmland Mut. Ins. Co.*, 14 Kan. App. 2d 321, 789 P.2d 1196, *rev. denied* 246 Kan. 768 (1990).

[15] *Gowing v. Great Plains Mutual Ins. Co.*, 207 Kan. 78, 483 P.2d 1072 (1971).

if the intent of the parties cannot be determined by the contract, courts will construe the policy in the way most favorable to the insured.[16]

It is a simple rule of construction to aid the court in determining the intention of the parties, and its basis is that the drafter of the contract must suffer the consequences if he or she does not make the terms clear.[17]

In this instance, the exclusion endorsement attached to the contract between respondent and Cincinnati Indemnity Company specifically excludes Edmond Carmona from coverage. Claimant's name is not mentioned. Claimant has shown a desire to be covered under the Workers Compensation Act, having filed an election when he was in private practice before becoming employed with respondent. Additionally, when claimant first became employed with respondent, he hired on as an employee, thereby entitling him to workers' compensation coverage. And, when claimant purchased the interest in the LLC, K.S.A. 44-542a (Furse 1993) did not include LLCs in the mandatory language requiring the filing of elections in order to obtain insurance coverage.

Finally, the insurance contract created between respondent and its insurance company, after K.S.A. 44-542a was modified to include LLCs, lists only Edmond Carmona as excluded from the policy. There is no indication that claimant was excluded or intended to be excluded. As contracts of this nature are to be construed against the writer when an ambiguity exists, the Board determines that claimant was covered under the Workers Compensation Act. Therefore, the obtaining of insurance coverage by claimant acts as an election by claimant to be covered under the Kansas Workers Compensation Act. At that point, when the election is made, it becomes the insurance carrier's obligation to file with the Director a written statement of election.[18] Failure by the insurance company to do so will not deny claimant coverage under the Workers Compensation Act.

The Board finds that claimant was included in the workers' compensation coverage provided by respondent and the Order of the ALJ denying claimant coverage in this matter should be reversed. Additionally, as other issues raised by the parties have not been determined by the ALJ, this matter will be remanded to the ALJ for further proceedings consistent with this Order.

AWARD

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[16] *Lightner v. Centennial Life Ins. Co.*, 242 Kan. 29, 744 P.2d 840 (1987).

[17] Id. at 36.

[18] K.S.A. 2002 Supp. 44-542a.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Brad E. Avery dated November 12, 2004, should be, and is hereby, reversed, and this matter is remanded to the Administrative Law Judge for proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this ____ day of May 2005.

BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director